



NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES

National Endowment for the Humanities

45 CFR Part 1167

RIN 3136-AA44

Testimony and Production of Records

AGENCY: National Endowment for the Humanities; National Foundation on the Arts and the Humanities.

ACTION: Proposed rule with request for comments.

SUMMARY: The National Endowment for the Humanities (NEH) is proposing to issue regulations to be followed when an NEH employee receives a demand or request to provide testimony or produce records in a legal proceeding. These procedures are designed to promote economy and efficiency in NEH's programs and operations, to minimize the possibility of involving NEH in controversial issues not related to its functions, to maintain the impartiality of NEH among private litigants, and to protect sensitive, confidential information and the deliberative process.

DATES: Send comments on or before [INSERT 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may send comments by email to gencounsel@neh.gov.

Instructions: Include "3136-AA44" in the subject line of the email.

FOR FURTHER INFORMATION CONTACT: Elizabeth Voyatzis, Deputy General Counsel, Office of the General Counsel, National Endowment for the Humanities, 400 7th Street, SW, Room 4060, Washington, DC 20506; (202) 606-8322; gencounsel@neh.gov.

SUPPLEMENTARY INFORMATION:

Background

The Federal courts have upheld the authority of a Federal agency to establish procedures governing the production of records and testimony by personnel in legal proceedings in which the agency is not a party. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). This proposed rule would establish policies and procedures that the agency will follow when, in a legal proceeding, a current or former NEH employee receives a demand or request to testify as to facts or events that relate to his or her official duties or the functions of NEH or to produce official records and information.

This proposed rule relates to testimony and the production of records only in connection with legal proceedings to which the United States is not a party. It would not apply to requests under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act of 1974, 5 U.S.C. 552a; Congressional demands or requests for testimony or records; or legal proceedings to which the United States is a party.

Request for Comments

NEH requests comments, which NEH must receive at the above address, by the above date.

Executive Order 12866, Regulatory Planning and Review, and Executive Order 13563, Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget for review.

Executive Order 13132, Federalism

This rulemaking does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

Executive Order 12988, Civil Justice Reform

This rulemaking meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988. Specifically, this rulemaking is written in clear language designed to help reduce litigation.

Executive Order 13175, Indian Tribal Governments

Under the criteria in Executive Order 13175, NEH evaluated this rulemaking and determined that it will not have any potential effects on Federally recognized Indian Tribes.

Executive Order 12630, Takings

Under the criteria in Executive Order 12630, this rulemaking does not have significant takings implications. Therefore, a takings implication assessment is not required.

Regulatory Flexibility Act of 1980

This rulemaking will not have a significant adverse impact on a substantial number of small entities, including small businesses, small governmental jurisdictions, or certain small not-for-profit organizations.

Paperwork Reduction Act of 1995

This rulemaking does not impose an information collection burden under the Paperwork Reduction Act. This action contains no provisions constituting a collection of information pursuant to the Paperwork Reduction Act.

Unfunded Mandates Reform Act of 1995

This rulemaking does not contain a Federal mandate that will result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year.

National Environmental Policy Act of 1969

This rulemaking will not have a significant effect on the human environment.

Small Business Regulatory Enforcement Fairness Act of 1996

This rulemaking will not be a major rule as defined in section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rulemaking will not result in an annual

effect on the economy of \$100 million or more, a major increase in costs or prices, significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

E-Government Act of 2002

All information about NEH required to be published in the *Federal Register* may be accessed at www.neh.gov. The website www.regulations.gov contains electronic dockets for NEH's rulemakings under the Administrative Procedure Act of 1946.

Plain Writing Act of 2010

To ensure this proposed rule speaks in plain and clear language so that the public can use and understand it, NEH modeled the language of the proposed rule on the Federal Plain Language Guidelines.

List of Subjects in 45 CFR 1167

Administrative practice and procedure.

For the reasons set forth in the preamble, the National Endowment for the Humanities proposes to amend 45 CFR chapter XI by adding part 1167 to read as follows:

PART 1167—TESTIMONY AND PRODUCTION OF RECORDS

Sec.

1167.1 Purpose.

1167.2 Applicability.

1167.3 Definitions.

1167.4 Testimony and production of official records and information.

1167.5 Procedure when demand is made.

1167.6 Office of Inspector General employees.

Authority: 5 U.S.C. 301.

§ 1167.1 Purpose.

(a) This part sets forth policies and procedures to be followed when an employee of the National Endowment for the Humanities (NEH) receives a demand to provide testimony or produce official records and information in connection with a legal proceeding in which the United States is not a party.

(b) The provisions of this part are intended to promote economy and efficiency in NEH's programs and operations; minimize the possibility of involving NEH in controversial issues not related to its functions; maintain the impartiality of NEH among private litigants; and protect sensitive, confidential information and the agency's internal deliberative process.

(c) This part does not waive the sovereign immunity of the United States.

(d) This part does not create any right or benefit, substantive or procedural, enforceable at law by a party against the United States.

(e) This regulation is not intended to conflict with 5 U.S.C. 2302(b)(13).

§ 1167.2 Applicability.

This part applies to demands and requests for factual or expert testimony or for official records or information in legal proceedings, except that it does not apply to:

(a) Demands upon or requests for an NEH employee to testify as to facts or events that are in no way related to his or her official duties or to the functions of NEH;

(b) Demands upon or requests for a former NEH employee to testify as to matters in which the former employee was not directly or materially involved while at NEH;

(c) Requests for the release of records under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act of 1974, 5 U.S.C. 552a;

(d) Congressional demands and requests for testimony or records; and

(e) Legal proceedings to which the United States is a party.

§ 1167.3 Definitions.

(a) *Agency* or *NEH* means the National Endowment for the Humanities.

(b) *Demand* means a subpoena, order, or other demand of a court or other competent authority, issued in a legal proceeding, for the production of official records and information or for the testimony of an NEH employee.

(c) *General Counsel* means the General Counsel of the agency, or any person to whom the General Counsel has delegated authority under this part.

(d) *Legal proceeding* means any proceeding before a court of law, administrative board or commission, hearing officer, or other body conducting a legal or administrative proceeding.

(e) *NEH employee* or *employee* means any present or former officer or employee of NEH; any other individual hired through contractual agreement by or on behalf of NEH, or who has performed or is performing services under such an agreement for NEH; and any individual who served or is serving on an NEH advisory committee.

(f) *Official records and information* means all documents and material in the custody and control of NEH; relating to information in the custody and control of NEH; or acquired by an NEH employee in the performance of his or her official duties or because of his or her official status, while the individual was employed by or on behalf of the NEH.

(g) *Request* means any request in connection with an ongoing or threatened legal proceeding, by whatever method, for the production of official records and information or for testimony, other than a demand.

(h) *Testimony* means any written or oral statement by a witness, and includes depositions, answers to interrogatories, affidavits, declarations, and statements at a hearing or trial.

§ 1167.4 Testimony and production of official records and information.

(a) No employee may produce official records and information or provide any testimony in response to a demand or request unless authorized to do so by the General Counsel in accordance with this part.

(b) The General Counsel, in his or her discretion, may grant an employee permission to testify or produce official records and information in response to a demand or request. In making this decision, the General Counsel shall consider whether:

(1) Allowing such testimony or production of records would be consistent with the purposes of this part;

(2) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice;

(3) Allowing such testimony or production of records would be in the best interest of NEH and the United States; or

(4) NEH has an interest in the outcome of the legal proceeding.

(c) If authorized to testify pursuant to this part, an employee may testify as to facts within his or her personal knowledge or produce official records and information, but, unless specifically authorized to do so by the General Counsel, shall not:

(1) Disclose confidential or privileged information;

(2) Testify as to matters regarding which the General Counsel determines that testimony would not be in the best interest of NEH or the United States;

(3) Produce official records and information regarding which the General Counsel determines that production would not be in the best interest of NEH or the United States; or

(4) Testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of NEH. (*See also* 5 CFR 2635.805.)

§ 1167.5 Procedure when demand is made.

(a) Whenever an employee is served with a demand to testify in his or her official capacity, or to produce official records and information, the employee shall notify the General Counsel immediately.

(b) The General Counsel shall review the demand and, in accordance with the provisions of § 1167.4, shall determine whether, or on what conditions, to authorize the employee to testify and/or produce official records and information.

(c) If a demand requires a response before the General Counsel has made the determination referred to in paragraph (b) of this section, the General Counsel shall provide the court or other competent authority with a copy of this part, inform the court or other competent authority that the demand is being reviewed, and seek a stay of the demand pending a final determination.

(d) If a court or other competent authority orders that an NEH employee comply with a demand notwithstanding a final decision by the General Counsel to the contrary, or at any other stage in the process, the General Counsel shall advise the employee on how to respond to such order and may arrange for legal representation of the employee.

§ 1167.6 Office of Inspector General employees.

Notwithstanding the requirements set forth in §§ 1167.1 through 1167.5, when an employee of the agency's Office of the Inspector General receives a demand or request to provide testimony or produce official records and information, the Inspector General or his or her designee shall be responsible for performing the functions assigned to the General Counsel under this part with respect to such demand or request.

Dated: December 28, 2021.

Samuel Roth,

Attorney-Advisor, National Endowment for the Humanities.

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